STATE OF MICHIGAN

COURT OF APPEALS

GARY HATHERLY and TINA HATHERLY,

Plaintiffs-Appellants,

v

THE HOME DEPOT, INC.,

Defendant-Appellee.

UNPUBLISHED
May 19, 2005

No. 250899
Genesee Circuit Court
LC No. 02-074172-NO

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

In this premises liability action, plaintiffs appeal as of right from the trial court's order granting defendant summary disposition under MCR 2.116(C)(10). Plaintiff Gary Hatherly was injured when he slipped and fell while shopping at defendant's home improvement store. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In his deposition, Gary Hatherly testified that he walked down the main aisle of the store from an area where the molding and trim were kept to the plumbing department. He testified that he did not see anything unusual as he was walking down the main isle. After locating what he wanted in the plumbing department, Gary Hatherly headed back to the main isle to go back to the molding and trim. As he turned onto the main aisle his left foot slipped out from underneath him. While he could not see any substance on the floor from a standing position, Gary Hatherly testified that as he was lying on the floor, he saw a grit or fine powder "all up and down the aisle."

On appeal, plaintiffs argue that the trial court erred in determining as a matter of law that plaintiffs presented no evidence that defendant knew or should have known about the substance on the floor. We disagree. We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When reviewing a motion for summary disposition under MCR 2.116(C)(10), the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. The moving party must specifically identify the matters that have no disputed factual issues. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d

817 (1999). Further, the moving party must support his position by affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The opposing party must then show, by submission of admissible evidence, that a genuine issue of material fact exists. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994).

The duty owed by a storekeeper to its business invitees is as follows:

> "It is the duty of a storekeeper to provide reasonably safe aisles for customers and he is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees or, if otherwise caused, where known to the storekeeper or is of such a character or has existed for a sufficient length of time that he should have known of it." [*Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968), quoting *Carpenter v Herpolsheimer's Co*, 278 Mich 697; 271 NW 575 (1937) (syllabus 1).]

Plaintiffs concede that there is no evidence that defendant and its employees caused the condition complained of. Therefore, the only issue on appeal is whether plaintiffs presented enough evidence to raise a jury question as to whether defendant was on constructive notice of the condition. The trial court held, and we agree, that defendant cannot be charged with constructive knowledge of a substance that Gary Hatherly's own testimony establishes was not visible from a standing position and that he had not noticed minutes before as he walked down the main aisle of the store to the plumbing department, even though it was, in his words, "all up and down the aisle." Given the lack of visibility and the relatively short period of time Gary Hatherly was in the store, defendant cannot be charged with constructive knowledge of the condition. *Kroll v Katz*, 374 Mich 364, 372; 132 NW2d 27 (1965). Therefore, defendant was entitled to summary disposition in this case.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Kurtis T. Wilder